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No. _____

In The
Supreme Court of the United States
October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FIFTH CIRCUIT HEEDED THIS COURT'S "GVR" ORDER DIRECTING IT TO RECONSIDER THE SUBJECT CLASS-ACTION SETTLEMENT IN LIGHT OF *AMCHEM PRODUCTS, INC.* v. *WINDSOR*.

II.

WHETHER THE *AHEARN* GLOBAL SETTLEMENT IS IN CONSONANCE WITH THE LAW ENUNCIATED IN *AMCHEM PRODUCTS, INC.* v. *WINDSOR*.

PARTIES TO THE PROCEEDING

THE PETITIONERS: Petitioners Flanagan and Middleton are merchant seaman who were exposed to Fibreboard's asbestos-containing products during their sailing careers. They objected to the Global Settlement Agreement and were granted leave to intervene in the proceedings. In the underlying proceedings they were sometimes referred to as the "Maritime Claimants" or "Maritime Intervenors."

THE RESPONDENTS: The caption under which this Petition is filed lists the other parties to the underlying *Ahearn* v. *Fibreboard* litigation out of which this Petition arises.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

REPORTED OPINIONS AND ORDERS 1

BASIS OF JURISDICTION:

A. Jurisdiction In This Court 1

B. Jurisdiction In The Lower Courts 2

CONSTITUTIONAL PROVISIONS AND COURT RULES PRIMARILY RELIED UPON BY PETITIONER 3

STATEMENT OF THE CASE 3

ARGUMENT:

A. GROUNDS FOR GRANT OF CERTIORARI 6

B. A JURIST'S PERSONAL FEELINGS CANNOT OPERATE TO SUSPEND THE RULE OF LAW. 6

C. AN EXTRAORDINARILY IMPORTANT CASE 11

D. FEELINGS OF DISQUIET ABOUT THE COVERACE CASE CANNOT SUPPLY THE REQUISITE COMMON ISSUES. 13

E. THE SAME INTRA-CLASS CONFLICTS WHICH CONSIGNED THE *AMCHEM* GLOBAL SETTLEMENT TO OBLIVION ARE FATAL TO THE *AHEARN* SETTLEMENT. 17

F. *AMCHEM* CONDEMNS THE GLOBAL SETTLEMENT AS IMPERMISSIBLE, JUDICIALLY-LEGISLATED TORT REFORM. 18

G. THE PANEL'S ULTRA-BRIEF PER CURIAM OPINION DOES NOT DISCHARGE ITS DUTY TO ENGAGE IN REASONED RECITATION ON REMAND. 20

CONCLUSION 22

TABLE OF AUTHORITIES

PAGE

CASES:

Ahearn v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) 1, 3, 22

Amchem Products, Inc. v. *Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) ..... *passim*

Bernbeck v. *Moore*, 936 F.Supp. 1543 (D. Neb. 1996) .. 1, 10

Bhandari v. *First National Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) 1, 9

Bodden v. *American Offshore, Inc.*, 681 F.2d 319, 1982 AMC 2409 (5th Cir. 1982) 7

Brandt v. *Schal Associates, Inc.*, 121 F.R.D. 368 (N.D. Ill. 1998) 7

Brown v. *Allen*, 344 U.S. 443, 73 S. Ct. 397 (1953) 8

Cervantes v. *Guerra*, 651 F.2d 974 (5th Cir. 1981) 8

Davis v. *Hallett*, 630 P.2d 1 (Alaska 1981) 7

Diamond v. *Charles*, 476 U.S. 54, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) 15

Dronenburg v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984) 8

Flanagan v. *Ahearn*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997) 13

Georgine v. *Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) 16

Georgine v. *Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996) 20

In re Asbestos Litigation (Ahearn I), 90 F.3d 963 (5th Cir. 1966) ..... *passim*

In re Asbestos Litigation, 101 F.3d 368 (5th Cir. 1996) 3, 5

In re Asbestos Litigation, 1996 U.S.App.LEXIS 33548 (5th Cir. Dec. 3, 1996) 3

PAGE

In re Asbestos Litigation (Ahearn II), 134 F.3d 668 (5th Cir. 1998) ..... *passim*

In re Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961) 6

Johnson v. *DeSoto County Board of Commissioners*, 72 F.3d 1556 (11th Cir. 1996) 8

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951) 22

Lawrence v. *Chater*, ___ U.S. ___, 116 S. Ct. 604 (1996) .. 21

Loughney v. *Hickey*, 635 F.2d 1063 (3d Cir. 1980) 21

N.L.R.B. v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970) 21

Northern Heel Corp. v. *Compo Industries, Inc.*, 851 F.2d 456 (1st Cir. 1988) 5

Ohio v. *Roberts*, 448 U.S. 56 (1980) 5

Pain v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980) 12

RD-DR Corporation v. *Smith*, 183 F.2d 562 (5th Cir. 1950) 9

Rivers v. *Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510 (1994) 8

State ex rel. Garlovsky v. *Eastmoore*, 393 So.2d 567 (Fla. App. 1981) 7

United States v. *Fisher*, 55 F.3d 481 (10th Cir. 1995) ... 21

United States v. *Jacobs*, 955 F.2d 7 (2d Cir. 1992) 8

United States v. *North*, 910 F.2d 843 (D.C. Cir. 1990), *superseded in part as to other issues on rehearing*, 920 F.2d 940, *cert. denied* 21

United States v. *Yakubu*, 936 F.2d 936 (7th Cir. 1991) 10

PAGE

STATUTES AND COURT RULES:

28 U.S.C. § 1254 2

28 U.S.C. § 1332 2

28 U.S.C. §§ 2073, 2074 19

Federal Rule of Civil Procedure 23 ..... *passim*

Federal Rule of Civil Procedure 24(b)(2) 14

Supreme Court Rule 10 6

U.S. Const. art. III, § 1 3

MISCELLANEOUS:

Bossert, Rex, *Asbestos Case Deepens Rift in 5th Circuit*, National L.J., Feb. 16, 1998 ..... 5, 20

Brown, Joe David, *Paper Moon* 35 (1971) 10

Gibeaut, John, *At the Crossroads*, 84 A.B.A.J. 60 (March, 1998) 13

Hunter, Gordon, *Rehnquist Redirects Attack on Asbestos Docket Backlog: New Panel Replaces Class Action Tactic*, Texas Lawyer, Oct. 8, 1990 18

Llewellyn, Karl N., *The Bramble Bush* (1960) 9

Report of the Proceedings of the Judicial Conference of the United States 33 (March 12, 1991) 18

Schmitt, Richard B., *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, Wall St. J., July 18, 1996, at A1 13

Schmitt, Richard B., *Thinning the Ranks: Diet-Pill Litigation Finds Courts Frowning on Mass Settlements*, Wall St. J., Jan. 8, 1998 12

Wright, C., Law of Federal Courts 508 (5th ed. 1994) 20

REPORTED OPINIONS AND ORDERS

The non-opt-out, Global Settlement Agreement being challenged was approved by the district court in *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D.Tex. 1995) [A-201].

A divided panel of the Fifth Circuit Court of Appeals affirmed the trial court *sub nom. In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) (*Ahearn I*) [A-70]. Rehearing *en banc* was denied over vigorous dissent by six members of this Court. *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir.1996) [A-67]. Rehearing by the original panel was denied without comment, *In re Asbestos Litigation*, 1996 U.S.App.LEXIS 33548 (5th Cir., Dec. 3, 1996) (unpublished) [A-253].

Flanagan and Middleton petitioned this Court for writ of certiorari which was granted. *Flanagan* v. *Ahearn*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997) (Docket No. 96-1379) [A-65]. On June 27, 1997, this Court remanded for further consideration in light of *Amchem Products, Inc.* v. *Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), decided just two days earlier.

On remand, the Fifth Circuit reaffirmed in a five-paragraph unsigned opinion endorsed by two members of the original panel. *In re Asbestos Litigation*, 134 F.3d 668 (5th Cir. 1998) (*Ahearn II*) [A-1]. There was, again, a vociferous dissent by the Honorable Jerry Smith. 134 F.3d at 70 *et seq.* [A-3].

BASIS OF JURISDICTION

A. Jurisdiction In This Court

Pursuant to Supreme Court Rule 14(e), Petitioner states that jurisdiction lies in this Court by virtue of the following:

(i) Date judgment or order sought to be reviewed was entered: The Fifth Circuit's *Ahearn II* slip

opinion reported at 134 F.3d 668 was filed on January 27, 1998. The Memorandum to Counsel formally transmitting a hard copy of the opinion indicates that judgment was entered that same day, January 27, 1998.

(ii) Date of orders respecting rehearing: There were no petitions for rehearing or suggestions for rehearing en banc.

(iii) Petitioner does not rely on Rule 12.5.

(iv) Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: This Court has jurisdiction to review the Opinion and Judgment in question pursuant to 28 U.S.C. § 1254, which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

Under Supreme Court Rule 13.1, this Petition is timely as it is being filed within 90 days of the Fifth Circuit's opinion and judgment thereon.

(v) This provision is not applicable to this proceeding.

B. Jurisdiction In The Lower Courts

The Class Action Complaint filed in the district court alleged subject-matter jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

❧ ❧ ❧

CONSTITUTIONAL PROVISIONS AND COURT RULES PRIMARILY RELIED UPON BY PETITIONER

U.S. Const. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Federal Rule of Civil Procedure 23 [A-290].

STATEMENT OF THE CASE

This is the second Petition for Writ of Certiorari that Petitioners Flanagan and Middleton are forced to bring to this Court to challenge the non-opt-out, Global Settlement Agreement originally approved by the district court in *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D.Tex. 1995) [A-201].

A divided panel of the Fifth Circuit Court of Appeals affirmed the trial court *sub nom. In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) (*Ahearn I*) [A-70].

Rehearing *en banc* was denied, *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996) (November 26, 1996) [A-67]. Rehearing by the original panel was denied without comment, *In re Asbestos Litigation*, 1996 U.S.App. LEXIS 33548 (5th Cir. Dec. 3, 1996) (unpublished) [A-253].

Flanagan and Middleton petitioned this Court for writ of certiorari which was granted. *Flanagan* v. *Ahearn*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997) (Docket No. 96-1379) [A-65]. On June 27, 1997, this Court remanded for further consideration in light of *Amchem Products, Inc.* v. *Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), decided just days earlier.

On remand, the cause was returned to the same three-judge panel which issued the *Ahearn I* decision. The parties were directed to submit "letter briefs" addressing the import of the *Amchem* decision and this

Court's GVR Order. On November 12, 1997, the court heard oral argument. [Transcript at A-33]. Present were the authors of the original *Ahearn I* opinion and dissent, Judges Davis and Smith.[1]

Judge Davis' comments and questions suggested that *Amchem* did not address Rule 23(a)'s commonality requirement [A-34]; that this Court's *Amchem* opinion "just rolled past commonality . . ." [A-34]; that the settlement is sufficient in and of itself to furnish the requisite common issues [A-38]; and that separate subclasses were not required for the presently-injured and future claimants [A-40-41].

The argument also had an aspect of unreality[2] as shown by the author of *Ahearn I*'s reluctance to acknowledge *Amchem*'s clear applicability to the instant case:

> JUDGE DAVIS: The Supreme Court in *Amchem* paid a lot of attention to the details of the settlement in the *Amchem* settlement. And they are strikingly different from the one in our case, are they not?

[A-41]

On January 27, 1998 the Fifth Circuit panel issued its opinion on remand. (*In re Asbestos Litigation*, 134 F.3d

---

1 The third panel member, Judge Reavley was absent for reasons unknown. The participants were advised that Judge Reavley would be provided with a tape recording of the oral argument.

2 It is worthy of mention that on remand these Petitioners and other persons who have objected to the Global Settlement were subjected to a not-so-subtle form of psychological warfare in which the Proponents of the Settlement adopted a pretense of bewilderment as to how the *Amchem* decision applied to *Ahearn*. A prime example: Following the remand the District Judge, during the course of a status conference held in the instant case, stated that he could not see for the life of him how *Amchem* applied to the instant case; and that, while he did not possess any "inside knowledge," he predicted that the Fifth Circuit panel would re-affirm *Ahearn* and that this Court would not grant certiorari a second time.

668 (5th Cir. 1998) (*Ahearn II*) [A-1]. In a five-paragraph unsigned opinion endorsed by two members of the original panel, the court reaffirmed its approval of the Global Settlement. The per curiam opinion, by its conclusions, suggests that it was folly for this Court to grant the writ of certiorari because *Ahearn* does not touch upon the principles set forth in *Amchem*.

There was, again, a vociferous Dissent by Judge Smith. 134 F.3d at 670-683 [A-3].

The panel majority's "opinion" (if the cursory, five-paragraph document can be so dignified) is remarkable in the most literal sense of the word; and indeed, it has been remarked upon. "The panel [majority] is thumbing its nose at the Supreme Court," said Professor Linda S. Mullenix, of the University of Texas School of Law. Rex Bossert, *Asbestos Case Deepens Rift In 5th Circuit*, National L.J., Feb. 16, 1998.

Mindful that the law does not require human beings to engage in idle ceremonies or vain acts[3], Petitioners sought neither panel rehearing nor rehearing en banc[4], but rather, proceeded straightaway to file this second Petition for Writ of Certiorari, confident that this Court does not regard its mandate as a mere scrap of paper which may be cavalierly disregarded.

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3 ***Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980); *Northern Heel Corp.* v. *Compo Industries, Inc.*, 851 F.2d 456, 461 (1st Cir. 1988) ("The law should not be construed idly to require parties to perform futile acts or engage in empty rituals.")**

4 As noted by the dissenting judge after the *Ahearn I* decision, the disqualification of five circuit judges, coupled with the voluntary non-participation by a sixth, left a situation in which a super-majority of 82% would be required to secure en banc review in this matter. *In re Asbestos Litigation (Flanagan* v. *Ahearn)*, 101 F.3d 368, 369 (5th Cir. 1996) (Smith, J., dissenting from denial of rehearing en banc).

ARGUMENT

A. GROUNDS FOR GRANT OF CERTIORARI

Petitioners urge the grant of a writ of certiorari pursuant to this Court's Rule 10, as follows:

(1) The United States Court of Appeals for the Fifth Circuit "has decided an important federal question in a way that conflicts with the relevant decisions of this Court," those decisions being *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) and the Court's GVR Order in this very case *In re Asbestos Litigation*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997).

(2) The United States Court of Appeals for the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10[a]).

B. A JURIST'S PERSONAL FEELINGS CANNOT OPERATE TO SUSPEND THE RULE OF LAW.

"[O]ne of the bedrocks of our system of Government is the imperative necessity of a lower Court to follow the mandate or pertinent decision of a higher Court. I will therefore always be bound by and follow any pertinent decision or mandate of the Supreme Court of the United States within its jurisdiction, even though I may disagree one trillion percent with the decision of that Court or the majority thereof." *In re Schlesinger*, 404 Pa. 584, 627, 172 A.2d 835, 855 (1961) (Bell, J., dissenting).

A judge with an agenda inconsistent with that of faithfully applying the law is a threat to the judiciary. It is clear to any thoughtful individual with even a cursory familiarity with the law, that *Amchem*, ***fairly*** read and

honestly applied, is a silver bullet through the heart of the *Ahearn* Global Settlement. As another appellate court wrote in a similar situation, "It is difficult to avoid the conclusion that [the lower court] was simply unhappy with our decision and chose to ignore it." *Davis* v. *Hallett*, 630 P.2d 1, 2 n.2 (Alaska 1981).[5]

The behavior of the Proponents of the settlement and the panel majority on remand seems to suggest that they are new arrivals from some parallel universe[6] in which there was a ***different*** *Amchem* decision from this Court — one which conferred a limitless blessing upon far-reaching global settlement and an expansive reading of Rule 23.

Federal judges are highly intelligent individuals who do not need to be "specifically admonished, in explicit, kindergarten terms, that he is to follow the . . . court's rule. He is expected to know that if he is a lawyer." *State ex rel. Garlovsky* v. *Eastmoore*, 393 So.2d 567, 572 (Fla. App. 1981) (stating same principle for attorneys).

While the Federal Circuit Courts of Appeal are usually, practically speaking, courts of last resort in run-of-the-mill litigation, they are, nevertheless "inferior courts" in the Constitutionally-established hierarchy of the federal system. As the late Judge John R. Brown wrote in sub-headings to the decision in *Bodden* v. *American Offshore, Inc.*, 681 F.2d 319, 321, 326, 1982 AMC 2409 (5th Cir. 1982):

> *When the Supreme Court Talks . . .*
>
> *. . . We Listen*[.]

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5 *Davis* v. *Hallett*, like the instant case, involved a second journey to the higher court where the lower court failed the heed the higher court's mandate handed down after the first appeal.

6 In the words of the court in *Brandt* v. *Schal Associates, Inc.*, 121 F.R.D. 368 (N.D. Ill. 1988),

> Perhaps there exists a parallel universe where "no" means "yes" and "up" means "down" (shades of Orwell's 1984) . . .

121 F.R.D. at 384 (criticizing certain arguments as "surreal").

All tribunals are not created equal. As Justice Jackson wrote in *Brown* v. *Allen*, 344 U.S. 443, 540, 73 S. Ct. 397, 427 (1953) (concurring in the result):

> We are not final because we are infallible, but we are infallible only because we are final.

In the more recent articulation of the rule in *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 1519 (1994), the Court noted that one of its prior decisions established that certain

> prior decisions of the Courts of Appeals . . . were *incorrect*. They were not wrong according to some abstract standard of interpretive validity, but the rules that necessarily govern our hierarchical federal court system. [citation omitted] It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.

This is — or ought to be — a wholly unremarkable proposition to any federal judge. "[W]hen the Supreme Court speaks clearly, we are bound to obey." *Cervantes* v. *Guerra*, 651 F.2d 974, 981 (5th Cir. 1981). Where binding precedent has been established by decision of a higher court, the lower court has "no discretion" to depart therefrom. *Johnson* v. *DeSoto County Board of Commissioners*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996). *See also United States* v. *Jacobs*, 955 F.2d 7, 9 (2d Cir. 1992) ("The lower court must adhere to the decision of a higher court even where it disagrees or finds error in it.")[7]

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[7] **The point was well made in *Dronenburg* v. *Zech*, 741 F.2d 1388, 1396 n.2 (D.C. Cir. 1984). Judge Bork noted that as an academic he had expressed disagreement with the Supreme Court's creation of "new constitutional rights," rights at issue in the case then before the D.C. Circuit. Judge Bork wrote, "These views are . . . completely irrelevant to the function of a circuit judge. The Supreme Court has decided . . . we are bound absolutely . . ." *Id.* The question, was "whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide." *Id.***

The duty of a lower court was well-stated many years ago in *RD-DR Corporation* v. *Smith*, 183 F.2d 562, 565 (5th Cir. 1950):

> Our duty is in accordance with the long settled and still controlling principles of judicial decision, despite vigorously announced views of individual judges to the contrary, to determine not how, if we were legislators we would write the law, but how, in accordance with the principles governing judicial decision, including Stare Decisis, and the adjudicated cases, which make up the law, it must be written.

The judicial duty to honor precedent carries with it the duty to do so ***honestly***, with ***good faith***. It is a disservice to the Rule of Law to engage in the sort of sophistry that one of the Fifth Circuit's esteemed jurists criticized as selective application of precedent: "This rule holds only to redheaded Walpoles in pale magenta Buick cars." *Bhandari* v. *First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion, quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]). In that case Judge Higginbotham further wrote that

> As an inferior court we must not allow our version of a "correct" result to deceive us into semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue.

Petitioners cannot escape the conclusion that just such an unprofessional "game" was being played on remand from this Court. As the Dissent wrote, "Even if, arguendo, the law that informs this case was not plain before the Court decided *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), that law is evident now." *Ahearn II* at 671 [A-3].

An inferior court may not "strip content from principle" confining the appellate holding "to the precise

facts before it." 829 F.2d at 1352. *See also United States* v. *Yakubu*, 936 F.2d 936, 939 (7th Cir. 1991) (criticizing "feeble attempt" to distinguish facts from Supreme Court precedent: "The Supreme Court does not sit to decide cases that will control only cases having identical facts.") *Accord*, *Bernbeck* v. *Moore*, 936 F.Supp. 1543, 1558-1559 (D. Neb. 1996) (emphasis added) ("I am required to apply *in good faith* the precedent of the United States Supreme Court whether I agree with that precedent or not.")

The positions taken by the Proponents of the Global Settlement on remand bear witness to the truth underlying the cynicism for lawyers entertained by so many laypeople. In the blunt words of a character depicted by Ryan O'Neal on the silver screen:

> Everybody knows those Big Mules up in Birmingham, and in places up north like Wall Street, hire lawyers full time jus' to show them how to bend the law or sneak aroun' it. There ain't nothin' illegal when it comes to business less'n you got the bad luck to get caught at it.

Joe David Brown, *Paper Moon* 35 (1971). The Proponents of *Ahearn*, it is respectfully submitted, seek not to distinguish *Amchem* in good faith, but rather to "bend the law" articulated in Justice Ginsburg's opinion or "sneak aroun' it."

A jurist's personal vision of some "higher good" is not a warrant to "casually dismiss" the teachings of this Court. As the Dissent wrote:

> The panel majority embraces a settlement that it considers a triumph of practicality. In doing so, it casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements. I do not believe the Supreme Court spoke cryptically in vacating our earlier opinion while articulating, in *Amchem*, the specific standards for us to apply

on remand. Because the majority adheres to an opinion that is foreclosed by the Court's reasoning, I respectfully dissent.

The Proponents of the Global Settlement couched the language of their briefing and argument to the panel to thrust the proposition that this Court's opinion in *Amchem* is effectively a nuisance that only operates to frustrate the ultimate operation of *Ahearn*. With that consideration the subtle strategy was offered to simply overlook and avoid the issues and impact of the case giving rise to the GVR. The panel then carried through to the conclusion of the strategy, by simply penning a five- paragraph memorandum opinion, omitting any substance or semblance of reconciling *Ahearn* with this Court's recent pronouncement, as a way to flout the mandate, and maybe get away with it.

C. AN EXTRAORDINARILY IMPORTANT CASE

The importance of this case to divining the contours of permissible class-action settlements under Rule 23 renders it imperative that the Court grant certiorari a second time, so as to complete the task the lower court has left undone.

"Regardless of what else one can say about *Ahearn*, . . . no one can fairly accuse it of being an ordinary case." *Ahearn I*, Dissent, 90 F.3d at 1021 [A-188]. "Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment." *Id.* at 1026 [A-199].

Judge Smith's *Ahearn I* dissent highlights the precedent-setting importance of *Ahearn*, an importance the which both *Ahearn I* and *II* majority opinions purposefully ignored:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map[8] for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Ahearn I, Dissent, 90 F.3d at 994 [A-128].

Indeed, this case is infamous. As one commentator wrote:

> Just a few years ago, it seemed that judges could resolve even the most complicated mass-injury cases with a single stroke of the pen. Settlements covering thousands of people — known as class actions — and involving products ranging from pickup trucks to heart valves regularly grabbed headlines. It seemed so easy that, in a big asbestos case, one federal judge in Texas loaded the lawyers on both sides into a van, drove them to his house and plied them with food and drinks until they came to terms.

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8 That "road map" leads unerringly to the Fifth Circuit, and will — if left unaltered — lend a new meaning to the term "forum shopping" (dare we say "dumping ground"). As every first-year law student knows, "the search for the forum with the most advantageous governing law lies at the very heart of the notion of forum-shopping." *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 794 n.105 (D.C. Cir. 1980).

Richard B. Schmitt, *Thinning the Ranks: Diet-Pill Litigation Finds Courts Frowning On Mass Settlements*, Wall St. J. (Jan. 8, 1998) (referring obliquely to the facts of *Ahearn*).

While the majority panel decision ignores the importance of its holdings, *Ahearn's* dramatic implications for the world of mass-tort are clear to the thoughtful legal mind. After a brief moment of clarity in the wake of this Court's *Amchem* decision, lawyers and corporate defendants with a pecuniary interest in such a legal gray area can be expected to play to the hilt the argument that the Fifth Circuit is a safe harbor from the teachings of *Amchem*. As one very recent commentary states, "The *Amchem* decision may have tossed cold water on mass tort ADR, but *Ahearn* may reignite the controversy." John Gibeaut, *At the Crossroads*, 84 A.B.A.J. 60 (March 1998).

As the only Court which can establish national standards for mass-tort settlements, this Court has a duty to see that the Fifth Circuit panel's decision does not "reignite" the controversies that *Amchem* was intended to resolve.

D. FEELINGS OF DISQUIET ABOUT THE COVERAGE CASE CANNOT SUPPLY THE REQUISITE COMMON ISSUES.

In its terse *Ahearn II* opinion, the panel majority stated that "All members of the class, and all class representatives, share the common interests: suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds." [A-2] This, concludes the majority, is sufficient under Rule 23(a). But this conclusion was reached without benefit of principles of *Amchem*.

Rule 23 requires commonality in questions cognizable as matters of law. As Justice Ginsburg wrote in *Amchem*:

> We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact . . . pre-

> dominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D. at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.
>
> The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos- exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see *supra*, at 2237-2238, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.

Amchem, 117 S. Ct. at 2249. In a footnote to the quoted passage, this Court stated explicitly that this teaching was not limited solely to Rule 23(b)(3):

> In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context — just as in the context of Rule 24(b)(2) governing permissive intervention — "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending

> law suit." Diamond v. Charles, 476 U.S. 54, 76-77, 106 S. Ct. 1697, 1711, 90 L. Ed. 2d 48 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

Id. at 2249 n.18.

In their briefing on remand, and at the oral argument, counsel for the Proponents of the Global Settlement were forced to concede as much. Counsel for Continental Insurance Company admitted that "the settlement cannot supply the requisites of commonality and typicality. And that is the teaching of the Supreme Court in *Amchem*." [A-59] The attorney for class counsel admitted that the only common issue the Settling Parties can assert is "risk posed by the coverage litigation." [A-45, quoting District Court's opinion]. "That was what this case was about." [A-46] He repeated the assertion:

> This court at 90 Fed 3d 976 held the named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to ensure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment.
>
> That's what this was about.

[A-46]. This litany of "common issues" has been reiterated over and over, by the district court, by the counsel for the Proponents of the Global Settlement, and by the panel majority in the Fifth Circuit. No matter how oft-repeated, the litany cannot surmount the requirements of Rule 23(a); they beg the question posed by *Amchem*. These are not "legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem, supra*. Fears about the outcome of the Coverage Case — litigation to which the class members were strangers — do not fill the bill for "legal or factual questions that qualify each class member's case as a genuine contro-

versy." Those questions concern the class member's asbestos-related claim against Fibreboard — not inchoate fears about whether a judgment against Fibreboard could be enforced. As the cogent *Ahearn II* Dissent observes, it is

> apparent that the panel majority based its finding of commonality solely on the now-discredited theory that the class members' interest in the settlement itself is sufficient to fulfill rule 23's commonality requirement.

Ahearn II Dissent at 682 [A-29]. In a footnote to the quoted passage, the Dissent pointed out:

> The common issues described by the district court and the first panel opinion are remarkably similar to one of the common issues relied on by the *Amchem* district court and squarely rejected by the Supreme Court: "their common 'interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.'" *Amchem*, ___ U.S. at ___, 117 S. Ct. at 2249 (quoting *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. at 316). This benefit, the Court held, "is a matter fit for legislative consideration, but *it is not pertinent* to the predominance inquiry." Id. (emphasis added).

Id. at 682 n.31 [A-29]. This absence of common issues dooms *Ahearn* for the same reason the *Amchem* settlement could not stand.

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E. THE SAME INTRA-CLASS CONFLICTS WHICH CONSIGNED THE *AMCHEM* GLOBAL SETTLEMENT TO OBLIVION ARE FATAL TO THE *AHEARN* SETTLEMENT.

In *Amchem* this Court agreed with the Third Circuit that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). The Court wrote:

> As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

117 S. Ct. at 2251.

> The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.

Id.

There is no principled way to distinguish the Global Settlement. Every fact set forth by Justice Ginsburg with respect to the CCR plan is equally true for *Ahearn*. Indeed, the conflict is more egregious in the instant "limited fund" case.[9] The CCR settlement fund was sub-

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[9] Petitioners note and renew their objection that *Ahearn* does not present a true limited fund. The Global Settlement, however, *is* limited in the sense that it contemplates that the guilty parties walk away with no obligation to the future injured, no matter how wide of the mark the projections are as to future liability.

ject to future replenishment, at least in theory. The Global Settlement is not. The "tug" between interests pulls with even greater urgency. In the absence of proper subclassing, the Global Settlement must fail for this reason alone.

F. *AMCHEM* CONDEMNS THE GLOBAL SETTLEMENT AS IMPERMISSIBLE, JUDICIALLY-LEGISLATED TORT REFORM.

Amchem recognizes, as did the Dissent in *Ahearn I*, that

> Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See *id.*, at 3, 27-35; see also *id.*, at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.[10]

117 S. Ct. at 2237.

> In the face of legislative inaction, the federal courts — lacking authority to replace state tort systems with a national toxic tort compensation

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10 **This is a familiar refrain amongst the judiciary — indeed, at least one member of the *Ahearn I* panel has been publicly so quoted. "I do not think there's a way to get at this [the national asbestos case backlog] without legislative and rule changes." Gordon Hunter, *Rehnquist Redirects Attack on Asbestos Docket Backlog; New Panel replaces Class Action Tactic*, Texas Lawyer, Oct. 8, 1990 (quoting Judge Reavley, Chairman of Ad Hoc Committee on Asbestos Litigation).**

> regime — endeavored to work with the procedural tools available to improve management of federal asbestos litigation.

Id. The Court, while explicitly acknowledging the asbestos phenomenon as a "crisis," underscored that the lower federal courts must indeed work with the *tools available*, and not devise new ones outside the law as written:

> And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right." § 2072(b).

117 S. Ct. at 2248. *See also* 117 S. Ct. at 2249 ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration").

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies,

> the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed. 1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

The warnings given by the Dissent in *Ahearn I* clearly are accepted and underscored by this Court in *Amchem*. Judicial frustration with Congressional inaction does not give the judiciary a jurisdictional blank check; "judicial inventiveness" is limited by the pre-existing law. So-called "tort reform," if it is to come, must come from the legislature, and not from a single judge, or group of judges, who have an agenda.

G. THE PANEL'S ULTRA-BRIEF PER CURIAM OPINION DOES NOT DISCHARGE ITS DUTY TO ENGAGE IN REASONED RECITATION ON REMAND.

As the Dissent points out, the five-paragraph unsigned opinion does not even fill a full page in the Federal Reporter. "I believe the remand in this immensely important case merits more thorough consideration than is reflected in the majority's terse per curiam treatment." *Ahearn II*, Dissent, 134 F.3d at 670 [A-4][11] The extreme brevity and lack of analysis by the panel majority is an insult to the importance of this case, the difficulty of the issues it presents, and the hundreds of thousands of class members whose rights stand or fall upon its final outcome.

On remand, even the Proponents of the Global Settlement stated that part of the rationale for any GVR dis-

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[11] **The kindest adjective that has been applied to the per curiam opinion is "brisk" (Rex Bossert, *Asbestos Case Deepens Rift In 5th Circuit*, National Law Journal, Feb. 16, 1998).**

position is that this Court does not wish to give a case plenary consideration where "they have not had the benefit of the Court of Appeals determination itself of the issue." [A-56] (statement by counsel for Continental Casualty). *See Lawrence* v. *Chater*, ___ U.S. ___, 116 S. Ct. 604 (1996) (noting that a GVR order "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits").

As one esteemed jurist wrote in *Loughney* v. *Hickey*, 635 F.2d 1063, 1068 (3d Cir. 1980) (Aldisert, J., concurring):

> In all cases of institutional or precedential consequence, the courts have a duty of reasoned elaboration . . . .

Similarly, in *United States* v. *Fisher*, 55 F.3d 481, 487 (10th Cir. 1995), the appellate tribunal criticized the lower court for its failure to elaborate on the reasons for a decision:

> In failing to state his reasons, the judge has, once again, left us in an unwelcome zone of speculation. Judicial action is not an exercise in *ipse dixit* — the bare assertion of any individual resting not on expressed reason, but merely on the authority vested in an office. According, when a judge takes action, it is fundamental that a basis grounded in law is articulated.

See also N.L.R.B. v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970) (articulated discussion of factors which lead court to one rather than to another result gives strength to the system and reduces, if not eliminates, easy temptation or tendency to ill-considered or even arbitrary action by those having awesome power of almost final review; rule permitting disposition without opinion must be used sparingly and must never be used to avoid difficult or troublesome decision or to conceal divisive or disturbing issues). *United States* v. *North*, 910 F.2d 843, 881 (D.C. Cir. 1990) ("the very premise of appellate review is

that reasoning matters"), *superseded in part as to other issues on rehearing*, 920 F.2d 940 (1990), *cert. denied*, 500 U.S. 941 (1991).

It is ancient learning that "justice must not only be done but must manifestly be seen to be done . . . ." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). The opinion of the majority panel below is so manifestly insufficient that this Court must conclude that — for whatever reasons — the majority panel below is simply unwilling to apply *Amchem* wholeheartedly. To correct this intolerable state of affairs a writ of certiorari must be granted.

CONCLUSION

In its original approval, the District Court was well aware that the legal efficacy of the Global Settlement was still to be pondered; still to be seen whether Rule 23 saves the day for it. *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 508 (E.D. Tex. 1995). Nearly five years have passed since this class action commenced. The Flanagan Petitioners, at great labor and expense, have climbed the rungs of the appellate ladder to the top. As to the question posed by the district court, it is answered by this Court in *Amchem*, and answered resoundingly in the negative.

This Court in *Amchem* has made strides in class action policy and has interpreted Rule 23 with meaningful guidelines in its operative features. If *Ahearn* is to stand, as the majority panel in the court below has decreed, then it will work to impede and indeed confuse the meaning and efficacy of the policy and jurisprudence set forth in *Amchem*. If *Ahearn* is reversed, and the reasoning of the dissent upheld, this case will act to augment the *Amchem* decision with vivid clarity and legal certainty. To grant the writ of certiorari is to

round off the uncertainties that otherwise would abound; to deny the writ would leave the state of applicable jurisprudence in a quandary.

Respectfully submitted,

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